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NO. 81-2232

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TOM S. BRUCE,

Petitioner,

v.

ROBERT L. KOSNOSKI,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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RULE AND STATUTES INVOLVED

Rule 17 of the Supreme Court of the United States 4, 11

§35-1-810 South Carolina Code of Laws (1976) 9, 10

§35-1-990 South Carolina Code of Laws (1976) 9, 10

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§35-1-1490 South Carolina Code of Laws (1976)..1, 2, 3, 5, 6, 9, 10

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BRIEF IN OPPOSITION

Statement

Respondent, Robert L. Kosnoski, instituted this action on December 1, 1977, seeking relief under Section 15 of the Securities Act of 1933, 15 USC 77o, Section 20 of the Securities Exchange Act of 1934, 15 USC 78t, and §35-1-1490(1) of the South Carolina Code of Laws (1976) (failure to register and deliver a

prospectus) and §35-1-1490(2) South Carolina Code of Laws (1976) (misrepresentations and omissions).

After discovery was completed and the case had been announced to be ready for trial, Respondent amended his Complaint by deleting his claims under the federal securities laws, and due to inadvertence the Amended Complaint did not include the specifications of misrepresentations and omissions which had been contained in the original Complaint. On October 7, 1980, thirteen days before the commencement of trial, the District Court permitted Respondent to further amend to reallege those same misrepresentations and omissions, whereupon Petitioner moved for a continuance. The Court's denial of that motion, and, after judgment, the affirmance thereof by the Court of Appeals, gave rise to this Petition for Writ of Certiorari.

As Petitioner points out at page 11 of his Petition, at the call of the case for trial he announced that he was ready to proceed to trial on the failure to register claim, but professed that he was not ready to proceed on the anti-fraud claims.

The trial of the action resulted in judgment against the Petitioner for both failure to register and provide a prospectus (§35-1-1490(1)) and the anti-fraud claim (§35-1-1490(2)) (Pet. pp. 45a-46a).

Argument

The insignificant question of whether the District Court abused its discretion in refusing to grant a continuance, particularly when the judgment was rendered upon additional grounds upon which Respondent stated that he was ready to proceed to trial, is so frivolous that it merits neither this Court's consideration

nor a lengthy discussion of the issues.

A. There are no special and important reasons why the writ prayed for should be granted.

Respondent ignores the admonition of Chief Justice Vinson that "Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them."* The Petition makes no attempt to "explain why it is vital that the question involved be decided finally by the Supreme Court."**

Clearly the issues discussed in the Petition satisfy none of the requirements of Rule 17 of this Court.

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*Before the American Bar Association, September 7, 1949, 69 S.Ct. VI.

**Ibid.

B. The District Court did not abuse its discretion in denying Petitioner's Motion for Continuance.

Respondent's original Complaint specifically alleged seven misrepresentations and six omissions in violation of §35-1-1490, South Carolina Code of Laws, 1976 (App. 7-9, 10); Petitioner's Answer set up numerous defenses thereto (App. 15-21); discovery took place from February through September 10, 1978, directed toward those pleadings (App. 1); the case was announced "ready for trial" on November 5, 1979, and "for trial" on January 3, 1980 and April 21, 1980, and counsel were directed to submit briefs and proposed findings of fact, when the pleadings were unchanged (App. 2). On May 29, 1980, counsel for both parties stipulated dismissal only of "the claims under the Securities Act of 1933, 15 USC §77a, et seq., in plaintiff's Complaint,

as amended" (Stipulation 5-29-80, Docket Number 17). The Amended Complaint filed May 29, 1980, which was patterned upon the Second Cause of Action of the original Complaint (App. 10-11, 23-25), alleged, "That based upon the representations hereinafter set forth . . ." (App. 24), and that the Defendant violated, inter alia, §35-1-1490, South Carolina Code of Laws, 1976 (App. 25), but the Amended Complaint did not recite the misrepresentations and omissions which had been set forth in paragraphs IX and XI of the First Cause of Action in the original Complaint and incorporated by reference in paragraph I of the Second Cause of Action in that Complaint (App. 23-25). Petitioner's Answer to the May 29 Amended Complaint asserted the same defenses that were asserted in his Answer to the original Complaint (App. 15-21, 38). The only

difference between the Amended Complaint of May 29, 1980, and the Amended Complaint of October 7, 1980, was the inclusion in the latter of the seven misrepresentations and six omissions that had been alleged in the original Complaint (App. 23-25, 32-36, 7-9); and Petitioner's Answer to the Amended Complaint of October 7, 1980, asserted the same defenses that were contained in his Answer to the original Complaint and his Answer to the Amended Complaint of May 29, 1980.

In view of the foregoing, it is abundantly clear that Respondent never "abandoned" his anti-fraud claim as Petitioner argues at page 10 of his Petition; he did not "radically change his theories of recovery against the Petitioner" (Pet. p. 7); and the Court of Appeals was eminently correct in its holding:

> Having concluded that the limited partnerships here qualify as securities under South Carolina law, defendant's remaining objections to the District Court's judgment can be dealt with swiftly. First, we cannot agree that the trial court abused its discretion in declining to allow a continuance after permitting plaintiff to amend his complaint thirteen days before trial. Defendant had actual notice of these claims months before trial, had conducted discovery of them long before trial, and had more than enough time to prepare his defense. The District Court's exercise of discretion, therefore, was faultless (Pet. pp. 11a-12a).

C. Even if the District Court had erred in denying Petitioner's Motion to Continue the trial of the anti-fraud claims, such error would have been harmless.

At the beginning of the trial, counsel for Petitioner advised the Court:

> Your Honor, the defendant is ready to proceed the trial on the failure to register claim under the South Carolina Blue Sky Act . . . ." (App. 123).

The trial then proceeded on that

claim as well as the anti-fraud claim, and the District Court Concluded as follows:

> 3. The securities in issue were not registered as required by the South Carolina Act and were not exempt from registration under that Act by virtue of §35-1-320(9) thereof, since a commission or other remuneration was paid in connection with Plaintiff's solicitation, no application was made to the South Carolina Securities Commissioner to withdraw such condition and such condition was not in fact withdrawn. Moreover, at no time did Defendant deliver or cause to be delivered to Plaintiff a prospectus approved by the Securities Commissioner covering these securities as required by S.C. Code §35-1-990.
>
> 4. The violations of S.C. Code §§35-1-810 and 35-1-990 by Defendant and persons for whose acts or omissions he is legally liable results in his liability under S.C. Code §35-1-1490(1).
>
> 5. In addition to, and regardless of, Defendant's liability under S.C. Code §35-1-1490(1), supra, Defendant is liable under S.C. Code §35-1-1490(2) by reason of the misrepresentations and omissions accompanying and

> precipitating the sale of the securities previously set forth.
>
> The Original Partnership, as well as the Land and Building Partnerships, were "issuers" within the meaning of S.C. Code §35-1-20(7), and Defendant was a "partner" in each of those partnerships within the meaning of S.C. Code §35-1-1500, and is jointly and severally liable for their delicts. Moreover, Defendant individually offered and sold the securities in issue and is individually liable for his misrepresentations and omissions under S.C. Code §35-1-1490(2), supra. (App. 90).

Under §35-1-1490, South Carolina Code of Laws, 1976, any person who (1) offers or sells a security in violation of, inter alia, §35-1-810 and §35-1-990 or (2) offers or sells a security by means of any untrue statement, etc. is liable to the person buying the security from him; thus, even if there had been any error with regard to the trial of the anti-fraud cause, such error would have

been entirely harmless.

Conclusion

The question raised in this Petition for Writ of Certiorari cannot conceivably rise to the level of substance and importance worthy of this Court's attention. The issues satisfy none of the requirements of Rule 17 of this Court. No Petitioner should impose upon this Court to decide whether harmless error has been committed.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness, against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 35-1-810, Code of Laws of South Carolina, 1976, provides:

> §35-1-810. Registration or exemption required.
>
> It is unlawful for any person to offer or sell any security in this State unless (a) it is registered under this chapter or (b) the security or transaction is exempted under §35-1-310 or 35-1-320.

Section 35-1-990, Code of Laws of South Carolina, 1976, provides:

§35-1-990. Prospectus must be furnished.

As a condition of registration a prospectus approved by the Securities Commissioner shall be sent or given to each person to whom an offer is made before or concurrently with (a) the first written offer made to him, otherwise than by means of a public advertisement, by or for the account of the issuer or any other person on whose behalf the offering is being made or by any underwriter or broker-dealer who is offering part of an unsold allotment or subscription taken by him as a participant in the distribution, (b) the confirmation of any sale made by or for the account of any such person, (c) payment pursuant to any such sale or (d) delivery of the security pursuant to any such sale, whichever first occurs.

Section 35-1-1490, Code of Laws of South Carolina, 1976, provides:

§35-1-1490. Liability to buyers for illegal or fraudulent sales or offers.

Any person who:

(1) Offers or sells a security

in violation of subsection (2) of §35-1-170 or §35-1-410 or §35-1-810, or of any rule or order under §35-1-50 which requires the affirmative approval of sales literature before it is used or of any condition imposed under §35-1-950 or §35-1-990; or

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

Is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and

interest at six per cent per year from the date of disposition.